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Report of Working Group IV (Electronic Commerce) on the work of its fifty-third session (New York, 9-13 May 2016)

Contents

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I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated Working Group IV to undertake work in the field of electronic transferable records.[1]

2. At its forty-fifth session (Vienna, 10-14 October 2011), the Working Group began its work on various legal issues relating to the use of electronic transferable records, including possible methodology for future work by the Working Group (A/CN.9/737, paras. 14-88).

3. At its forty-fifth session, in 2012, the Commission reaffirmed the mandate of the Working Group relating to electronic transferable records and requested the Secretariat to continue reporting on relevant developments relating to electronic commerce.[2]

4. At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued its examination of the various legal issues that arose during the life cycle of electronic transferable records (A/CN.9/761, paras. 24-89). At its forty-seventh session (New York, 13-17 May 2013), the Working Group had the first opportunity to consider the draft provisions on electronic transferable records. It was reaffirmed that the draft provisions should be guided by the principles of functional equivalence and technology neutrality, and should not deal with matters governed by the underlying substantive law (A/CN.9/768, para. 14).

5. At its forty-sixth session, in 2013, the Commission reaffirmed the mandate of the Working Group and agreed that work towards developing a legislative text in the field of electronic transferable records should continue.[3]

6. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its work on the preparation of draft provisions on electronic transferable records. The Working Group also took into consideration legal issues related to the use of electronic transferable records in relationship with the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 19 March 1931) (A/CN.9/797, paras. 109-112). At its forty-ninth session (New York, 28 April-2 May 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.128 and Add.1.

7. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of the Working Group to develop a legislative text on electronic transferable records that would greatly assist in facilitating electronic commerce in international trade.[4]

8. At its fiftieth session (Vienna, 10-14 November 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.130 and Add.1. Subject to a final decision to be made by the Commission, the Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records (A/CN.9/828, para. 23). At its

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[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

[2] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 90.

[3] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 230 and 313.

[4] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 149.

fifty-first session (New York, 18-22 May 2015), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.132 and Add.1.

9. At its forty-eighth session, in 2015, the Commission encouraged the Working Group to finalize the current work in order to submit its results at the Commission's forty-ninth session bearing in mind that an UNCITRAL model law on electronic transferable records would be accompanied by explanatory materials.[5]

10. At its fifty-second session (Vienna, 9-13 November 2015), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.135 and Add.1. The Working Group proceeded with its deliberations of the notions of electronic transferable records and of control as functional equivalent of possession as well as of a general reliability standard.

II. Organization of the session

11. The Working Group, composed of all States members of the Commission, held its fifty-third session in New York from 9 to 13 May 2016. The session was attended by representatives of the following States members of the Working Group: Armenia, Belarus, Brazil, China, Colombia, Côte d'Ivoire, Czech Republic, Ecuador, El Salvador, France, Germany, Honduras, India, Indonesia, Italy, Japan, Kenya, Kuwait, Namibia, Nigeria, Pakistan, Panama, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Uganda, United States of America and Venezuela (Bolivarian Republic of).

12. The session was also attended by observers from the following States: Belgium, Iraq, Peru, Qatar, Senegal, Sudan, Sweden, Syrian Arab Republic, Tunisia and United Republic of Tanzania.

13. The session was also attended by observers from the Holy See and the European Union.

14. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: World Bank;

(b) *Intergovernmental organizations*: Caribbean Court of Justice (CCJ), Organisation Maritime de l'Afrique de L'Ouest et du Centre (OMAOC);

(c) *International non-governmental organizations*: American Bar Association (ABA), CISG Advisory Council, European Law Students' Association (ELSA), International Federation of Freight Forwarders Associations (FIATA), International Technology Law Association (ITECHLAW) and Law Association for Asia and the Pacific (LAWASIA).

15. The Working Group elected the following officers:

Chairperson: Ms. Giusella Dolores FINOCCHIARO (Italy)

Rapporteur: Ms. Omotunde M. OKE (Nigeria)

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[5] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 231.

16. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.IV/WP.136); and (b) A note by the Secretariat entitled "Draft Model Law on Electronic Transferable Records" (A/CN.9/WG.IV/WP.137 and Add.1).

17. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of the draft Model Law on Electronic Transferable Records.
5. Technical assistance and coordination.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

18. The Working Group engaged in discussions on the draft Model Law on Electronic Transferable Records on the basis of documents A/CN.9/WG.IV/WP.137 and Add.1. The deliberations and decisions of the Working Group are reflected in chapter IV below. The Secretariat was requested to revise the draft provisions to reflect those deliberations and decisions.

IV. Draft Model Law on Electronic Transferable Records

Draft article 1. Scope of application

Paragraphs 3 and 4

19. It was recalled that paragraph 3 had been included in draft article 1 to clarify that certain documents that might be considered transferable in some jurisdictions did not fall under the scope of the Model Law. It was added that the list of excluded documents was open-ended to provide desired flexibility to enacting States, since there was no uniformity in national legislation with regard to defining documents or instruments as transferable.

20. It was recalled that, at its fifty-second session, the Working Group agreed that States parties to the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the "Geneva Conventions") could exclude under paragraph 3 the documents or instruments falling under the scope of the Geneva Conventions from the scope of application of the Model Law, thus avoiding potential conflicts between the Geneva Conventions and the Model Law (A/CN.9/863, paras. 21 and 22).

21. It was suggested to delete paragraph 4, since the open-ended exclusion list in paragraph 3 was viewed as sufficient to cover the issue addressed in paragraph 4. In

response, it was said that the two paragraphs were different in scope, as paragraph 3 excluded documents or instruments that could not be issued in electronic form, while paragraph 4 dealt with the exclusion of electronic transferable records existing in a purely electronic environment.

22. It was explained that paragraph 4 aimed at allowing the application of the Model Law to electronic transferable records that existed only in an electronic environment on a residual basis as in case of conflict the Model Law would not prevail over the law applicable to electronic transferable records that existed only in an electronic environment. However, concerns were expressed on the desirability of extending general principles contained in the Model Law to laws of a different nature.

23. After discussion, the Working Group agreed that paragraph 4 should be deleted and that paragraph 3 should, in addition to the current text, contain a reference to documents and instruments falling under the scope of the Geneva Conventions in square brackets as well as a reference to the law governing electronic transferable records only existing in electronic form, also in square brackets.

Draft article 2. Definitions

"electronic transferable record"

24. The Working Group referred to its conclusion that certain documents or instruments, which were generally transferable, but whose transferability was limited due to other agreements, such as straight bills of lading, would not fall under the definition of "transferable document or instrument" and that the Model Law would therefore not apply to those documents or instruments (A/CN.9/797, paras. 27 and 28). The Working Group clarified that that statement should not be interpreted as preventing the issuance of those documents or instruments in an electronic system designed to handle electronic transferable records since that prohibition was likely to result in unnecessary multiplication of systems and increase of costs.

25. In light of the information requirements contained in draft article 9, the Working Group after discussion agreed that the definition of "electronic transferable record" should read: "'electronic transferable record' is an electronic record that complies with the requirements of article 9". The view was expressed that that definition should be reviewed upon completion of the consideration of all articles of the Model Law to evaluate its appropriateness for each instance where the defined term was used.

"transferable document or instrument"

26. A reference was made to article 965 of the Swiss Code of Obligations as a possible alternative source of inspiration for the definition of "transferable document or instrument".

27. The Working Group agreed to retain the definition with editorial modifications, so that it would read "'transferable document or instrument' means a document or instrument issued on paper that entitles the holder to claim the performance of the obligation indicated in the document or instrument and to

transfer the right to performance of the obligation indicated in the document or instrument through the transfer of that document or instrument".

Draft article 3. Interpretation

28. It was noted that the principle of "good faith" was a general principle of international trade law contained in a number of UNCITRAL texts, including those on electronic commerce. It was added that the principle of "good faith" was not related to interpretation.

29. In response, it was indicated that the principle of good faith had a specific meaning with respect to transferable documents or instruments, which was distinct from the general principle of good faith in international trade law. It was added that, while other UNCITRAL texts on electronic commerce focused on contracts, the Model Law on Electronic Transferable Records focused on documents or instruments. For those reasons, it was suggested that reference to a principle of "good faith" in the Model Law was not appropriate.

30. After discussion, the Working Group agreed to delete the words "and the observance of good faith" in paragraph 1. It was understood that the principle of good faith as a general principle of international law could be included in the general principles on which the draft Model Law was based under paragraph 2.

General principles

31. The Working Group agreed that the general principles underlying the Model Law would be discussed at a future session.

Draft article 4. Party autonomy [and privity of contract]

Paragraph 1

32. Different views were expressed with respect to the content and purpose of draft article 4, paragraph 1.

33. It was indicated that party autonomy was a general principle of international trade law and that limiting party autonomy could hinder technological innovation and the development of new business practices. It was added that the implementation of the Model Law required a high level of flexibility, which had to be achieved through party autonomy.

34. In response, it was noted that party autonomy in other UNCITRAL texts, including those on electronic commerce, referred to derogations with respect to contracts, and that those derogations concerned only parties to those contracts, while derogations under the Model Law could have an impact also on third parties. It was added that mandatory provisions contained in substantive law applicable to transferable documents or instruments should apply also to electronic transferable records, and that it should not be possible to avoid application of those mandatory provisions by means of party autonomy.

35. In that line, it was indicated that an analysis of each provision of the Model Law was necessary in order to ascertain which ones could be derogated from or varied. It was said that draft article 12 was possibly one of those provisions. It was noted that draft article 10, paragraph 2, made reference to agreement as one

circumstance relevant to assess reliability. It was added that draft article 13 was not relevant for that analysis, as it dealt with consent to the use of electronic transferable records, which was by definition voluntary.

36. The Working Group considered different drafting options.

37. It was suggested to identify the provisions that could be derogated from or varied in draft article 4, paragraph 1. The view was also expressed that the list of those provisions should be left blank so that each enacting jurisdiction could identify the relevant provisions, which could differ in the various jurisdictions.

38. Another suggestion was the deletion of draft article 4, paragraph 1 and the insertion of the words "Unless the parties agree otherwise" at the beginning of each non-mandatory provision.

39. Yet another suggestion referred to recasting draft article 4, paragraph 1, along the following lines: "The parties may derogate from or vary by agreement the provisions of this Law, unless that agreement would not be valid or effective under applicable law or would affect the rights of any person that is not a party to that agreement." It was explained that that suggestion was inspired by article 4 of the UNCITRAL Model Law on Electronic Commerce that limited party autonomy to contractual matters in a manner that did not affect third parties (see Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996), paras. 44 and 45).

40. It was indicated that the identification of provisions of law of mandatory nature differed from jurisdiction to jurisdiction. Therefore, it was said that the text of draft article 4, paragraph 1 as contained in A/CN.9/WG.IV/WP.137, paragraph 35 should contain an open-ended list of provisions, so as to give flexibility to States.

41. The suggestion was also made to draft the provision so as to indicate that all articles of the Model Law were of mandatory application. Yet another view was that the Model Law should not be interpreted as allowing derogation of mandatory substantive law and, to that end, the alternative draft contained in paragraph 39 above was preferable.

42. After discussion, the Working Group agreed on the following draft of paragraph 1:

> "The parties may derogate from or vary by agreement [provisions of this Law]."

43. The Working Group also agreed that explanatory materials would explain that the purpose of that paragraph was to enable States to identify which provisions could be derogated from.

Paragraph 2

44. The Working Group deferred the consideration of paragraph 2 to a future session.

Draft article 5. Information requirements

45. It was explained that draft article 5 referred to information relating to a person, while draft articles 15 and 16 referred to information contained in the electronic

transferable record. It was further explained that the information requirements referred to in draft article 5 were contained in law other than the Model Law, such as regulatory requirements to prevent money-laundering. It was added that the obligation to comply with those information requirements would in any case arise under draft article 1, paragraph 2, and that draft article 5 contained a useful reminder.

46. The concern was raised that the reference to "other information" could be too broad and possibly conflict with draft article 15. In response, it was said that other law would specifically identify the required information, but that those requirements could change in light of their purpose and of available means, among others, and that therefore a certain level of flexibility in referring to them was desirable.

47. After discussion, the Working Group decided to retain draft article 5 unchanged.

Draft article 8. Signature

48. The Working Group considered the drafting options contained in draft article 8. It was indicated that the provision was meant to apply only to electronic transferable records and not to electronic records that were not transferable, though used in connection with electronic transferable records. For that reason, it was added, the use of the word "by" was preferable.

49. After discussion, the Working Group decided to retain the word "by" outside square brackets and to delete the words "[with respect to]" and "[in relation to]".

Draft article 9. [Electronic transferable record]

Paragraph 1

"equivalent"

50. The view was expressed that the word "equivalent" was necessary to clarify that an electronic transferable record required the same information contained in the transferable document or instrument of the same type. The words "corresponding" or "as having the same purpose" were suggested as alternative drafts. In response, it was indicated that the use of a qualifier was not necessary in view of the purpose of draft article 9 to provide a rule on functional equivalence. It was added that an electronic transferable record would necessarily contain the information identifying it as the functional equivalent of a transferable document or instrument, and that insertion of a further qualifier such as "equivalent" could create uncertainty.

51. After discussion, the Working Group agreed that an electronic transferable record should contain the same information as the transferable document or instrument of the same type. On the basis of that understanding, the Working Group agreed to delete the word "equivalent".

"authoritative"

52. It was recalled that paragraph 1 set forth the requirements for the functional equivalence between an electronic transferable record and a transferable document or instrument by combining the "control" and the "singularity" approaches (A/CN.9/834, para. 86). It was added that the word "authoritative" was necessary to

identify the operative record that was transferable under the singularity approach, which was precisely the function pursued with subparagraph 1(b)(i). It was noted that the use of the word "authoritative" in domestic legislation did not seem to pose particular interpretative challenges. The use of the word "definitive" was suggested as an alternative draft.

53. In response, it was indicated that, while it was correct that draft article 9 was based on both the "control" and the "singularity" approaches, the purpose of the provision was to identify the electronic transferable record as opposed to other electronic records that were not transferable, and that that alone could suffice to express the singularity approach. It was added that the word "authoritative" created significant interpretative challenges, especially in certain languages. It was therefore suggested that all bracketed text in subparagraph 1(b)(i) should be deleted. In turn, it was indicated that, at least in certain languages, the resulting text did not provide sufficient clarity and actually introduced a circular argument.

54. After discussion, the Working Group confirmed that paragraph 1 was based on the singularity and the control approaches and that it was necessary to appropriately reflect both approaches in the draft provision. The Working Group also took note of the fact that drafting challenges to reflecting accurately the singularity approach in subparagraph 1(b)(i) remained.

55. It was suggested that the word "only" should replace the word "authoritative" in order to adequately address linguistic challenges arising from the use of the word "the" to identify the electronic transferable record. However, the view was expressed that the word "only" was not acceptable since it implied the notion of "uniqueness" that the Working Group had, after extensive discussions, decided to abandon in favour of the concept of singularity. In response, the view was expressed that the word "only" merely referred to the concept that the electronic record would be identified as the operative electronic transferable record and was not to be understood as referring to the notion of uniqueness.

56. The Working Group recalled its agreement that draft article 9 was meant to combine the singularity and the control approaches (A/CN.9/834, para. 86). The Working Group recalled its previous discussions and deliberations on the notion of "uniqueness" (A/CN.9/804, paras. 38, 71 and 74; see also A/CN.9/834, paras. 22-26 and 86). It was also reiterated that the notion of "singularity" related to the reliable identification of the electronic transferable record that allowed requesting performance of the obligation indicated in it, so that multiple claims of the same obligation would be avoided.

57. Different alternatives were suggested to replace the word "authoritative" and overcome linguistic and interpretative challenges. Suggested words included: "definitive", "reliable", "primary", "necessary" and "required".

58. The Working Group confirmed its agreement that draft article 9 was meant to combine the singularity and the control approaches (A/CN.9/834, para. 86). It also confirmed that the word "the" in the English, French and Spanish languages was intended as a qualifier referring to the singularity approach.

59. Different proposals were made with respect to the text of draft article 9, paragraph 1(b)(i). Concerns were expressed that the word "only" could be interpreted as referring to the notion of uniqueness, which, as the Working Group

had repeatedly indicated, was not relevant for the purposes of the Model Law. In response, it was said that the word “only” did not imply uniqueness, as it was precisely because more than one electronic record containing the information could exist, that there was a need to use the word “only”. The Working Group decided not to use the word “only”.

60. After discussion, the Working Group requested the Secretariat to identify adequate translations in all official languages for the words “to identify that electronic record as the electronic transferable record” which the Working Group had agreed upon in the English, French and Spanish languages.

Paragraph 2

“authorized”

61. It was indicated that paragraph 2 related to system integrity and that therefore that provision should refer to authorized changes, i.e. changes allowed by the system, but should not refer to legitimate changes, which presupposed a legal assessment. It was explained that an unauthorized change, for instance performed by a hacker, would necessarily compromise the integrity of the electronic transferable record.

62. After discussion, the Working Group agreed to retain the word “authorized” in paragraph 2.

Integrity

63. It was noted that the notion of integrity had been considered as an absolute one (A/CN.9/863, para. 42). In that respect, it was explained that the notion of integrity referred to a fact and, as such, was absolute or objective, i.e. either an electronic transferable record retained integrity or not. However, it was added, the reference to the reliable method used to retain integrity was relative or subjective, and the assessment of that method was subject to the general reliability standard contained in draft article 10.

64. The question was asked whether the reference to a reliable method contained in subparagraph (1)(b)(ii) was appropriate. In response, it was confirmed that that reference was appropriate and that it referred to the reliability of the system used to render the electronic record capable of being subject to control.

65. It was noted that the last sentence of paragraph 2 was redundant since it repeated in part draft article 10(1)(a), a general provision on the assessment of the reliability standard applicable also to draft article 9.

66. After discussion, the Working Group agreed to retain subparagraph 1(b)(ii) without amendments and to delete the last sentence of paragraph 2.

Draft article 9 and electronic transferable records existing only in electronic form

67. It was asked whether an electronic transferable record existing only in electronic form could satisfy the requirements of draft article 9 and, thus, could fall under the definition of electronic transferable record contained in draft article 2. In response, it was said that, while an electronic transferable record existing only in electronic form could satisfy the requirements of draft article 9, paragraph 1(b), that

record would need to define autonomously the information requirements and therefore would not satisfy the requirements of draft article 9, paragraph 1(a). It was added that, if an electronic transferable record did not define autonomously the information requirements, it would be functionally equivalent of the transferable document or instrument whose information requirements it satisfied, and therefore it would not be an electronic transferable record existing only in electronic form.

Title

68. Several suggestions were made with respect to the title of draft article 9. After discussion, the Working Group agreed on "transferable document or instrument" as an appropriate title, since it was in line with the drafting style used for other articles providing for a functional equivalent in the draft Model Law.

Draft article 10. General reliability standard

Subparagraph 1(a)

69. The Working Group agreed to replace the word "quality" with the word "security" in subparagraph 1(a)(iv) since quality did not lend itself easily to an objective assessment. It was added that the notion of security was more directly relevant for assessing the reliability of the method.

70. A suggestion was made to add a reference to "state of the art" in subparagraph 1(a)(vii) since it was a well-known term commonly referred to in commercial practice, but the Working Group decided not to do so.

Subparagraph 1(b)

71. It was suggested that the words "agreed to" should be deleted as the provision did not relate only to functions that had been agreed upon contractually. It was also suggested that the words "for which the method has been used" should replace the words "agreed to" to better clarify the scope of the provision. It was noted that that suggestion would further align subparagraph 1(b) with article 9, subparagraph 3(b)(ii) of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005).

72. Another suggestion was that the word "necessary" should be included before the word "functions" and the words "elements of facts" should replace the word "evidence", but the Working Group decided not to do so.

73. After discussion, the Working Group agreed that the words "agreed to" should be deleted.

Paragraph 2

74. Different views were expressed with respect to paragraph 2.

75. It was indicated that the parties should not be allowed to derogate from the requirements set forth in draft article 10 for assessing the reliability of an electronic transferable record. It was explained that admitting that contractual derogation would amount to introducing different standards for the assessment of reliability whose application would depend on the parties involved, and that that could result in inconsistent findings in respect of the validity of the electronic transferable

record, and therefore affect third parties. It was added that party autonomy should be limited to allocation of liability under the limits set forth in applicable law (see also A/CN.9/863, para. 75). For those reasons, it was suggested that paragraph 2 should be deleted.

76. Another view was that paragraph 2 did not refer to the possibility for the parties to contractually agree on the validity of the electronic transferable record, but to agree on risk allocation. It was explained that, since agreement on risk allocation was possible under draft article 4, paragraph 2 was redundant and should be deleted. It was added that the assessment of the reliability of the electronic transferable record under a legislative objective standard and the allocation of risks among parties under an agreed subjective standard were actually complementary.

77. A third view was that paragraph 2 fulfilled a useful function by explicitly recognizing the importance of contractual agreements, especially when applicable to closed systems or reflecting industry standards. Thus, the provision supported technological innovation and the allocation of related risks. It was indicated that any party agreement on the level of reliability would not affect third parties. One proposal was that the reference to contractual agreements should be listed as one of the relevant circumstances under subparagraph 1(a).

78. After discussion, the Working Group agreed that the draft Model Law did not prevent parties from contractually allocating some liability. The Working Group agreed to delete paragraph 2.

Draft article 11. Indication of time and place in electronic transferable records

79. It was indicated that draft article 11 did not fulfil any useful function as it was not a functional equivalence rule and that it should be replaced by a provision offering actual guidance on the determination of time and place, possibly drafted following the approach adopted in article 10 of the Electronic Communications Convention.

80. In response, it was said that significant legal consequences were attached to the notions of time and place in the life-cycle of transferable documents and instruments. Hence, it was added, draft article 11 offered a useful reminder of the importance of indicating that information in electronic transferable records.

81. It was added that the reference to the use of a reliable method in indicating time pointed at the desirability of using trust services such as trusted time-stamping in the management of electronic transferable records.

82. After discussion, the Working Group agreed that draft article 11 should be retained with the square brackets deleted.

Draft article 12. [Location of parties] [Determination of place of business]

83. It was said that draft article 12 offered elements useful with respect to contractual exchanges, but not relevant with regard to electronic transferable records. In response, it was noted that the determination of place of business was relevant, in particular, for the cross-border use of electronic transferable records. It was explained that important legal consequences, such as determination of scope of application and of jurisdiction, were attached to the place of business.

84. It was indicated that parties would often agree on matters related to the place of business, but that the law could limit party autonomy in that respect. It was further indicated that a set of suppletive rules on the determination of the place of business could usefully complement parties' agreements.

85. It was noted that draft article 12 offered guidance only on elements not to be taken solely into consideration in order to ascertain the determination of the place of business. It was suggested to recast draft article 12 so that it would also provide positive elements for that determination.

86. In that line, an alternative draft of article 12 was suggested, based on article 10 of the Electronic Communications Convention:

"Draft article 12. Place of Dispatch and Receipt

1. An electronic transferable record is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business.

2. This article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic transferable record is deemed to be received under paragraph 1.

3. For the purposes of this Law, a party's place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.

4. If a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of this Law is that which has the closest relationship to the electronic transferable record, having regard to the circumstances known to or contemplated by the parties at any time before or at the time of dispatch or receipt of the electronic transferable record.

5. If a natural person does not have a place of business, reference is to be made to the person's habitual residence.

6. A location is not a place of business merely because that is:

(a) Where equipment and technology supporting an information system used by a party in connection with electronic transferable records are located; or

(b) Where the information system may be accessed by other parties.

7. The sole fact that a party makes use of an electronic address or other element of an information system connected to a specific country does not create a presumption that its place of business is located in that country."

87. It was explained that the alternative draft did not aim at displacing existing rules but only at supplementing them with respect to the use of electronic means. It was added that offering such guidance was essential to enable cross-border use of electronic transferable records. Some support was expressed for that proposal.

88. However, it was also said that the proposal focused on the notions of dispatch and receipt that were applicable to contract formation but not to electronic transferable records, for which concepts such as the time of issuance, transfer and presentation were legally relevant. It was added that the application of the provision could lead to a multiplication of legally relevant locations, which introduced uncertainty and unpredictability.

89. It was further said that under the substantive law, a dispatch and receipt of an electronic transferable record could be an issuance or transfer of the electronic transferable record (depending on whether the person was the issuer or transferor). Therefore, it was relevant for draft article 12 to refer to notions of dispatch and receipt without referring to the substantive law notions.

90. It was explained that draft article 11 dealt satisfactorily with all matters relating to time and place relevant to the use of electronic transferable records. In response, it was indicated that draft article 11 referred to indication of time and place, while draft article 12, especially in its suggested new formulation, aimed at providing guidance on the determination of a location when electronic means were used.

91. With respect to the title of the provision, support was expressed for retaining the words “determination of place of business” since it best reflected the content of the article. The words “determination of location” were also suggested in order to encompass all possible references to determination of a location in connection with an electronic transferable record.

92. After discussion, the Working Group agreed to retain draft article 12 with the title “determination of place of business”.

Draft article 13. Consent to use an electronic transferable record

93. It was suggested that consent was a matter pertaining to the general provisions of the draft Model Law and that draft article 13 should be positioned accordingly. It was also suggested that draft article 13 should be merged with draft article 6, thus following the structure of article 8 of the Electronic Communications Convention.

94. The Working Group agreed to merge draft article 13 with draft article 6.

Draft article 14. Issuance of multiple originals

95. Different views were heard on the desirability of recognizing the practice of issuing multiple originals in an electronic environment and on the relevance of that practice for business.

96. The view was expressed that the alternative draft of paragraph 1 contained in paragraph 12 of A/CN.9/WG.IV/WP.137/Add.1 was preferable as it was clearer. However, the view was also expressed that that alternative draft did not convey effectively that the law did not preclude the issuance of multiple authoritative copies of the same electronic transferable record.

97. It was indicated that paragraph 2 had become redundant since draft article 9, paragraph 1(a) already required that the electronic transferable record should contain an indication of the issuance of multiple originals whenever substantive law set forth that requirement.

98. The question was raised whether the draft Model Law should deal with the possibility of issuing simultaneously multiple originals in both electronic and paper form.

99. After discussion, the Working Group agreed to delete paragraph 2.

Draft article 15. [Substantive] information requirements of electronic transferable records

100. The Working Group agreed that draft article 15 should be deleted as redundant since the information requirements contained in draft article 9, paragraph 1(a) already satisfied its purpose.

Draft article 16. Additional information in electronic transferable records

101. A suggestion was made to delete draft article 16 as redundant in light of the information requirements contained in draft article 9, paragraph 1(a). In response, it was indicated that draft article 16 aimed to clarify that draft article 9 did not prevent the inclusion in an electronic transferable record of any additional information that might not be contained in a transferable document or instrument due to the different nature of the two media. Therefore, draft article 16 contained an additional element to draft article 9.

102. After discussion, the Working Group agreed to retain draft article 16 without modification.

Draft article 17. [Control]

Placement

103. The Working Group agreed to place draft article 17 consecutively after draft article 9 as the two articles were logically related.

Title

104. It was suggested to use the word "possession" as a title in line with the naming style used in the draft Model Law. In response, it was said that, although an exception to that naming style, the word "control" was preferable as it referred to a particularly relevant notion in the draft Model Law and therefore better highlighted the content of draft article 17.

105. The Working Group agreed to retain as title the word "control" outside the square brackets.

"identify" or "establish"

106. Support was expressed for retaining the word "identified" in subparagraph 1(b) since its clear meaning avoided substantive law implications associated with the word "establish". It was clarified that the word "identify" did not contain any obligation to name the person in control (see A/CN.9/828, para. 63).

107. Another suggestion was to use the word "demonstrate", since that word would best reflect the purpose of the provision to clearly indicate who the person in control was.

108. After discussion, the Working Group agreed to retain the word "identify" outside the square brackets in subparagraph 1(b).

"a person"

109. It was clarified that the word "person" in subparagraph 1(b) could refer to natural or legal persons. It was noted that, in practice, in most cases, a legal person would be in control.

110. The view was reiterated that reference to a person in control did not exclude the possibility of having more than one person exercising control (see also A/CN.9/828, para. 63).

Draft article 18. Endorsement

111. Different views were expressed with regard to draft article 18.

112. It was said that the words "included in" were sufficiently accurate for the purpose of the provision and should be retained, while the reference to "indicating the intention to endorse" was neither appropriate nor necessary.

113. In response, it was said that the words "included in" did not reflect the composite nature of an electronic transferable record and that the words "logically associated with or otherwise linked to so as to be included" should be used instead. It was replied that, in light of the definition of electronic record, the words "included in" should be understood as encompassing instances when the information was logically associated with or otherwise linked to the electronic transferable record.

114. After discussion, the Working Group agreed to retain the following draft of article 18 on the understanding that the words "included in" should be understood as encompassing instances when the information was logically associated with or otherwise linked to the electronic transferable record:

> "Where the law requires or permits the endorsement in any form of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if the information required for the endorsement is included in the electronic transferable record and that information is compliant with the requirements set forth in articles 7 and 8."

Draft article 20. Reissuance

115. It was indicated that the reissuance of an electronic transferable record was a matter of substantive law and, as such, was already permitted under draft article 1, paragraph 2. Accordingly, the Working Group agreed to delete draft article 20 as redundant.

Draft article 21. Replacement of a transferable document or instrument with an electronic transferable record

Paragraph 1

116. It was said that the alternative draft contained in paragraph 40 of A/CN.9/WG.IV/WP.137/Add.1 was preferable since it avoided ambiguity by being drafted in the active voice. However, a concern was expressed that the word

"replace" could be misinterpreted as referring to the notion of reissuance. In response, it was said that reissuance and change of medium were distinct concepts, and that draft article 21 clearly referred to the latter.

117. After discussion, the Working Group agreed to retain the draft of paragraph 1 contained in paragraph 40 of A/CN.9/WG.IV/WP.137/Add.1.

Paragraph 3

118. It was suggested to insert the words "shall be made inoperative and" before the word "ceases" to reflect that the transferable document or instrument could not be further transferred after change of medium. It was added that the suggested addition would leave sufficient flexibility to industry on the choice of the method to render the transferable document or instrument inoperative. In that respect, it was noted that a transferable document or instrument could fulfil other functions besides those typical of a transferable document or instrument, such as providing evidence of a contract for the carriage of goods and of receipt of the goods, and that those additional functions would continue to be fulfilled after the document or instrument had been made inoperative.

119. Another suggestion was to include in paragraph 3 a reference to paragraph 1 in order to clarify that the electronic transferable record had to be issued in accordance with both paragraphs 1 and 2.

120. After discussion, the Working Group agreed on the following draft of paragraph 3: "Upon issuance of the electronic transferable record in accordance with paragraphs 1 and 2, the transferable document or instrument shall be made inoperative and ceases to have any effect or validity."

Draft article 22. Replacement of an electronic transferable record with a transferable document or instrument

121. In light of the fact that draft article 22 mirrored the structure of draft article 21, the Working Group agreed that the modifications agreed upon with respect to draft article 21 should apply also to draft article 22.

122. The view was expressed that draft article 21 and 22 should be subject to party autonomy. In that line, it was suggested that, in case of deletion of draft article 4, the words "Unless the parties agree otherwise" should be added at the beginning of those two articles.

Draft article 23. Division and consolidation of an electronic transferable record

123. It was indicated that division and consolidation of an electronic transferable record were a matter of substantive law and, as such, permitted under draft article 1, paragraph 2. Accordingly, the Working Group agreed to delete draft article 23 as redundant.

Draft article 24. Non-discrimination of foreign electronic transferable records

Paragraph 1

124. It was indicated that paragraph 1 should provide solely a rule on non-discrimination of foreign electronic transferable records and that that goal could be achieved by the following draft:

> "An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used abroad".

125. It was recalled that paragraph 1 aimed exclusively at preventing that the place of issuance or of use of the electronic transferable record could be considered in themselves reasons to deny legal effect, validity or enforceability of an electronic transferable record (see A/CN.9/WG.IV/WP.137/Add.1, para. 55) and that it did not affect substantive law, including private international law. Thus, for instance, it was explained that paragraph 1 could not per se lead to the recognition of an electronic transferable record issued in a jurisdiction that did not recognize the legal validity of electronic transferable records.

126. The view was expressed that a provision on non-discrimination such as the suggested paragraph 1 did not suffice to actively promote cross-border use of electronic transferable records. It was added that explicit reference to a substantially equivalent level of reliability was necessary to achieve that goal as well as to encourage technological development. Another suggestion referred to the insertion of a reference to interoperability besides the one to the substantially equivalent level of reliability.

127. In the same line, it was noted that the alternative draft of paragraph 1 contained in paragraph 59 of A/CN.9/WG.IV/WP.137/Add.1 aimed to offer elements that went beyond establishing non-discrimination of foreign electronic transferable records and towards establishing mutual legal recognition. However, it was added, the impact of that draft was limited by its negative formulation.

128. After discussion, the Working Group agreed that paragraph 1 should aim to provide only for non-discrimination and should therefore be retained as follows: "An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used abroad." A proposal was made to include a reference to the substantially equivalent level of reliability in draft article 10, paragraph 2, but the proposal was not retained.

Paragraph 2

129. It was recalled that paragraph 2 reflected the Working Group's understanding that the draft Model Law should not displace private international law rules applicable to transferable documents or instruments (A/CN.9/768, para. 111). It was noted that, though the paragraph restated a principle already contained in article 1, paragraph 2 of the draft Model Law, its retention was desirable since private international law rules could be considered procedural rules and therefore the term "substantive law" could be interpreted as not including private international law.

130. It was explained that, since paragraph 1 referred only to non-discrimination while paragraph 2 related to private international law, the two paragraphs operated on different levels and did not interfere.

131. After discussion, the Working Group agreed to retain paragraph 2 without modification.

V. Other business

A. Future work

Identity management

132. One delegation expressed the intention to submit a proposal on identity management for the consideration of the Working Group at its next session, subject to confirmation by the Commission that identity management would be included on the agenda of the Working Group at that session. Delegations were invited to submit information on identity management with a view to facilitating consideration of the topic.

Cloud computing

133. The view was expressed that UNCITRAL work on cloud computing was desirable and urgent. In particular, it was said that the preparation of a guidance document on contractual aspects of cloud computing would promote the use of cloud computing services, which were in increasing demand. States were encouraged to share expertise on that issue in preparation of the future work of UNCITRAL.

B. Other matters

134. Concerns were expressed with regard to the use of informal consultations. In response, reference was made to the desirability of using informal consultations in order to maximize efficient use of conference time (A/CN.9/638, para. 22).